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No. 91-1873

In the Supreme Court of the United States

OCTOBER TERM, 1992

VIRGIN ATLANTIC AIRWAYS, LTD., ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, under this Court's decisions in *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), and *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), the district court had jurisdiction to review a decision of the National Mediation Board that certain of petitioner Virgin Atlantic's fleet service employees were eligible to vote in a representation election conducted by the Board under the Railway Labor Act, 45 U.S.C. 151 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 956 F.2d 1245. The order of the district court (Pet. App. 25a-27a) is unreported. The decisions of the National Mediation Board (Pet. App. 28a-29a, 83a-84a) are reported at 15 N.M.B. 170, 179.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1992. The petition for a writ of certiorari was filed on May 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 17, 1988, the National Mediation Board received an application filed by the International Brotherhood of Teamsters pursuant to Section 2, Ninth of the Railway Labor Act asking the Board to investigate an alleged representation dispute among fleet service employees of petitioner Virgin Atlantic Airways, Ltd. The Board promptly assigned a mediator to the case, and informed the parties that the investigation would commence with a meeting at Virgin Atlantic's offices on March 1, 1988. Pet. App. 54a-55a; C.A. App. 73-77.

During March, 1988, the Board's mediator met and corresponded with Virgin Atlantic and the Teamsters in order to determine the roster of employees eligible to vote on the question of representation. The mediator considered various circumstances brought to her attention by the parties, including the fact that six former employees had been discharged but had filed an action for reinstatement that was then pending in the U.S. District Court for the Southern District of New York. Pet. App. 55a-56a.

By letter dated March 30, 1988, the mediator established an official list of eligible voters, set a deadline of April 11 for appeals concerning eligibility, and informed the parties that ballots would be mailed on April 1 and counted on April 25. Pet. App. 57a, 71a-72a. The employees seeking reinstatement were included as eligible voters pursuant to the Board's rules (29 C.F.R. 1206.6; Pet. App. 33a) and the normal procedures reflected in the Board's Representation Manual (Pet. App. 35a-36a). At the time the election period and count date were established (in accordance with the Board's customary procedures), the Board was not aware of any particular

anticipated date for the resolution of the reinstatement litigation. Pet. App. 57a.

On April 11, 1988, the Board received a letter from Virgin Atlantic contesting the eligibility of three employees, and on April 15 the mediator ruled in Virgin Atlantic's favor. Pet. App. 57a-58a; C.A. App. 103-105. On April 19, Virgin Atlantic requested that the Board remove from the eligibility list Michael Wilson, an employee who had been a party to the reinstatement action, because Virgin Atlantic asserted that he had been recalled to work but had subsequently resigned. Pet. App. 58a; C.A. App. 109. On the same date (six days before the scheduled ballot count), Virgin Atlantic sent a separate telegram informing the Board that trial of the reinstatement action had been scheduled (before the mediator set the date for the representation election) for April 25. The company requested that the count be delayed for one day so that counsel could be present.[1] The company further requested that the ballots of the individuals seeking reinstatement be specially handled and, if relevant to the outcome, counted only if the district court ruled in the employees' favor. Pet. App. 58a, 80a-82a.

On April 20, 1988, the Board sent the parties a telegram indicating that ballots received by the original cutoff time (2 p.m. on Monday, April 25) would be impounded at that time "and counted at a later date after all questions of eligibility [had] been determined." Pet. App. 43a, 58a. The telegram in effect reserved final determinations of eligibility (such as a ruling on the status of Michael Wilson)

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[1] The telegram explicitly noted that the extension should not alter the cutoff time for the receipt of ballots by the Board. Pet. App. 81a.

until they could be made by the appropriate Board officials, all of whom were at a Board conference in Canada from April 18 through April 22, 1988. Pet. App. 58a. The telegram was silent regarding the date or time *as of which* determinations of eligibility would be made.

On April 26, one day after the responsible officials' return to Washington, the Board formally denied Virgin Atlantic's request to deviate from its normal procedures and accord special treatment to the ballots cast by the employees involved in the reinstatement action. Pet. App. 83a-84a. The Board did, however, find Michael Wilson ineligible to vote based on the information supplied by Virgin Atlantic. Pet. App. 59a-60a. In accordance with the Board's decision, the ballots were opened and counted on April 27, 1988. The Board received ballots from 12 of the 21 voters it had determined to be eligible, and all 12 ballots were ruled valid and cast in favor of the Teamsters. Pet. App. 59a, 91a-92a. The Board thereafter certified the Teamsters as the representative of Virgin Atlantic's fleet service employees. Pet. App. 28a-29a, 60a.

The ballots received included four from plaintiffs in the reinstatement action, who remained eligible under the Board's rules as of the cutoff time of 2 p.m., April 25, because their reinstatement action was still pending at that time.[2] (Pet. App. 40a, 83a-84a.) The district court did not dismiss their reinstatement claims until the morning of April 27, the day of the physical ballot count (which took place

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[2] Of the six original plaintiffs in the reinstatement action, two including Michael Wilson) were rehired by Virgin Atlantic before the election and the decision in the case.

in the afternoon) but two days after the cutoff date and impoundment of the ballots. *Id.*

2. Virgin Atlantic and certain of its employees brought this action in federal district court to challenge the Board's certification. The district court denied the Board's motions to dismiss or for summary judgment, asserting jurisdiction on the ground that the Board's action "grossly violated" the Railway Labor Act. C.A. App. 215-216, 314-321. The district court granted petitioners' motion for summary judgment, and entered final judgment against the Board. Pet. App. 25a-27a.

The court of appeals reversed (Pet. App. 1a-24a). The court determined that the record did not suggest that the Board had violated the Railway Labor Act or petitioners' constitutional rights. The court therefore concluded that the district court lacked jurisdiction to review the Board's decisions.

ARGUMENT

The court of appeals' decision is correct under, and indeed compelled by, this Court's decisions in *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), and *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*Railway Clerks*). The holdings of those cases have been so consistently followed over the past half century that Virgin Atlantic does not even argue that the decision below creates a conflict with any decision of this Court or of another court of appeals. This case involves no more than a routine representation dispute resolved by the Board in accordance with its statutory mandate and standard procedures, and does not warrant review by this Court.

1. a. Congress has vested the National Mediation Board with plenary authority to resolve representation disputes under the Railway Labor Act and to protect the employees' statutory right under Section 2, Ninth of the Act to elect a bargaining representative. See 45 U.S.C. 152, Ninth. This Court has twice recognized in no uncertain terms that Congress intended the Board—and not the judiciary—to have the final word in resolving representation questions. As the Court has explained, Congress intended that such a dispute would "reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Switchmen's Union*, 320 U.S. at 305. See also *Railway Clerks*, 380 U.S. at 659. The courts of appeals have repeatedly adhered to the principle that Board decisions concerning representation elections are not subject to judicial review.[3]

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[3] See, *e.g.*, *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989); *Air Line Pilots Ass'n, Int'l* v. *Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir.), cert. denied, 484 U.S. 963 (1987); *Zantop Int'l Airlines, Inc.* v. *National Mediation Bd.*, 732 F.2d 517 (6th Cir. 1984); *British Airways Bd.* v. *National Mediation Bd.*, 685 F.2d 52 (2d Cir. 1982); *Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 656 F.2d 16, 20 n.6 (2d Cir. 1981); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.*, 574 F.2d 394, 397-399 (8th Cir.), cert. denied, 439 U.S. 881 (1978); *International Bhd. of Teamsters* v. *Brotherhood of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 253-256 (2d Cir. 1963) (Friendly, J.), cert. denied, 376 U.S. 913 (1964); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.*, 314 F.2d 234, 236-237 (D.C. Cir. 1962); *Rutas Aereas Nacionales, S.A.* v. *Edwards*, 244 F.2d 784, 785 (D.C. Cir. 1957); *American Air Export & Import Co.* v. *O'Neill*, 221

This Court did recognize in *Railway Clerks* that while Congress precluded judicial review of Board representation decisions, the courts may afford a remedy for "an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act*." 380 U.S. at 659-660 (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)). The Court emphasized, however, that this was an exception with " 'narrow limits' and 'painstakingly delineated procedural boundaries.' " *Id.* at 660 (quoting *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

b. The court of appeals correctly determined that there was no basis for the district court to exercise jurisdiction under this limited exception. In *Railway Clerks*, where an employer challenged the Board's definition of the appropriate "craft or class" of employees within which to hold a representation election, the Court held that the Board's action was "reviewable only to the extent that it [bore] on the question of whether [the Board] performed its statutory duty to 'investigate' the dispute" under Section 2, Ninth of the Act. 380 U.S. at 661. Applying that standard to this case, it is clear that the Board proceeded expeditiously and thoroughly to meet with the parties to the dispute, solicit their views on the eligibility of voters, review and resolve challenges to eligibility (based on the facts as it determined them to be and on its own established rules and procedures), and hold the election. As the court of appeals found (Pet. App. 13a), neither the statute nor *Railway Clerks* required more. See 380 U.S. at 661-666. Judicial review was accordingly foreclosed.

F.2d 829, 830 & n.4 (D.C. Cir. 1954); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, 201 F.2d 36, 38-39 (4th Cir.), cert. denied, 345 U.S. 992-993 (1953).

Petitioners argue (Pet. 7-14) that the routine eligibility decisions made by the Board in this case were somehow "jurisdictional," and therefore subject to judicial review. Petitioners rely on cases where courts have found jurisdiction to review the Board's determination of whether an employer was a "carrier" under the Railway Labor Act.[4] But such cases raise the threshold question of whether the Board has any "power to act at all" to resolve representation disputes at a particular workplace, *Delpro*, 676 F.2d at 962, and are inapposite to the question in this case. There is no question that Virgin Atlantic is a carrier, that the Board's jurisdiction under Section 2, Ninth of the Act was properly invoked by the application filed with the Board by the Teamsters, and that the Board thereafter had both the power and the duty (see *Railway Clerks*, *supra*) to investigate the representation dispute, conduct elections if necessary, and certify a bargaining representative. Virgin Atlantic's complaint concerns only whether the Board properly allowed four particular individuals to vote in an election that the Board indisputably had the right to conduct.[5]

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[4] See *Delpro Co.* v. *Brotherhood of Ry. Carmen*, 676 F.2d 960 (3d Cir. 1982); *International Longshoremen's Ass'n* v. *North Carolina Ports Auth.*, 463 F.2d 1 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir.), cert. denied, 396 U.S. 962 (1969).

[5] Similarly, in *America West Airlines, Inc.* v. *National Mediation Bd.*, No. 90-16337 (July 7, 1992), the Ninth Circuit upheld jurisdiction to review the Board's decision to send a notice to participants in a rerun election suggesting that the Board had found that the employer violated the Act by interfering with the prior election. The court concluded that the Board's jurisdiction is limited to investigating and resolving representation disputes, rather than adjudicating

Virgin Atlantic in essence alleges only that the Board mishandled a representation dispute—in particular, that it erred in determining who was eligible to participate and when eligibility would be determined. But as this Court has held, the Act unmistakably commits these very questions to the Board's discretion: Section 2, Ninth states that "[i]n the conduct of any election * * * the Board shall designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152, Ninth), leaving to the Board "the task of selecting the methods and procedures which it should employ in each case." *Railway Clerks*, 380 U.S. at 661-662. The courts of appeals have therefore repeatedly held that the determination of who is an employee eligible to vote in a representation election is not subject to judicial review. See, *e.g.*, *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, *supra*; *International Ass'n of Machinists & Aerospace Wkrs.* v. *Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.*, 314 F.2d 234 (D.C. Cir. 1962).

2. Petitioners argue that the Board's decision to count the four disputed votes somehow conflicted with the power of the district court that heard and ruled on the reinstatement action (Pet. 14-16). But the Board merely set a customary schedule for the election, including deadlines for the receipt of ballots and determinations of eligibility—before being informed

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claims of employer interference. Even if correct, *America West* is irrelevant to the present case. Like the carrier definition cases, it involved allegations that the Board had stepped out of the role assigned to it by Congress, rather than merely charges that it had played that role incorrectly.

of the trial date set for the reinstatement action, and certainly before it had any reason to speculate about when a decision in that action might have been forthcoming. The Board's decision to count the votes of individuals who had claims for reinstatement pending, and thus were eligible voters under 29 C.F.R. 1206.6, as of the deadline for the receipt of ballots was eminently reasonable, and in any event well within the Board's plenary discretion to "establish the rules to govern the election." 45 U.S.C. 152, Ninth.[6] That decision in no way undercut the district court's power to determine the merits of the reinstatement case when and as it chose.[7]

3. Petitioners' claim that *Switchmen's Union* should be overruled also do not warrant review. This Court has repeatedly stated, of course, that it will rarely overrule prior precedent interpreting a statute. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989), citing *Square D Co.* v. *Niagara Frontier Tariff Bu-*

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[6] The Board's decision to preserve the status quo as of the originally scheduled election date accorded with its general practice, as reflected in prior published decisions. *Continental Airlines*, 14 N.M.B. 131 (1987); *Trans World Airlines, Inc.*, 13 N.M.B. 220 (1986); *Altair Airlines*, 7 N.M.B. 489 (1980). See also Pet. App. 59a (¶ 20) (affidavit of Board's Executive Director).

[7] Any concern for the role of the courts in *representation disputes*, as opposed to reinstatement actions that might have incidental effects on representation, is misplaced; surely *Switchmen's Union* and fifty years of subsequent cases make clear that the courts' role in such disputes is minimal.

reau, Inc., 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Petitioners present no persuasive reason why this Court should take the highly unusual step of overruling such a well established statutory precedent.

Petitioners complain (Pet. 18) that lack of judicial review allows the Board to "concoct[]" policies like that of preserving the status quo on eligibility when ballots are for some reason not counted on the election date originally set by the Board. Petitioners' implication of the Board's ad hoc capriciousness in such matters is belied, however, by their own example: the status quo policy is based on standard Board practice set out years ago in publicly reported Board decisions. *Continental Airlines, supra*; *Trans World Airlines, supra; Altair Airlines, Inc., supra.* The policy is clear, logical, easy to apply and fair to all parties.

Petitioners' unsupported allegations that the Board has "embarked upon its own political agenda with little regard for effectuating the purpose of the statute" (Pet. 6) by making representation decisions "notoriously designed to produce outcome-determinative results which favor large national labor unions" (Pet. 18) also provide no reason to overrule the Court's longstanding interpretation of the Act.[8] Such allegations should instead be addressed to Congress, which can determine for itself whether the Board has abused its broadly delegated powers, and amend the Act to allow for judicial review if it sees fit to do so.

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[8] These allegations might come as something of a surprise not only to the Board, but to the wide variety of "large national labor unions" that have rather regularly been the Board's adversaries before this and other courts.

This Court has twice made clear that Congress intended a representation dispute such as this one "to reach its last terminal point when the administrative finding was made." *Switchmen's Union*, 320 U.S. at 305; *Railway Clerks*, 380 U.S. at 659. In this case, the "dragging out of the controversy into other tribunals of law" that concerned the Court in *Switchmen's Union*, 320 U.S. at 305, has already consumed four years of legal, administrative and judicial time. There is no reason for this Court to examine the matter further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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